

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

NAVY SEALS 1-3, et al.,

Plaintiffs,

v.

LLOYD AUSTIN, III, in his official capacity as
Secretary of Defense, *et al.*,

Defendants.

Case No. 4:21-cv-01236-O

DEFENDANTS' APPENDIX IN SUPPORT OF THEIR
EMERGENCY MOTION TO SCHEDULE DEPOSITION
FOR JUNE 24, 2022 OR OTHER DATES THEREAFTER

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App001–App003	Attachment 1 - Second Declaration of Admiral William K. Lescher
App004–App026	Attachment 2 - Declaration of Amy E. Powell & Exhibits
App007–App019	Ex. A to Powell Declaration – Email Thread (May 2, 2022)
App020–App023	Ex. B to Powell Declaration – Notice of Deposition (April 25, 2022)
App024–App026	Ex. C to Powell Declaration – Letter from Amy Powell (April 29, 2022)

Dated: May 3, 2022

Respectfully submitted,

BRIAN M. BOYNTON

Principal Deputy Assistant Attorney General

ALEXANDER K. HAAS

Director, Federal Programs Branch

ANTHONY J. COPPOLINO

Deputy Director

/s/ Amy E. Powell

ANDREW E. CARMICHAEL (VA Bar. No. 76578)

AMY E. POWELL

Senior Trial Counsel

STUART J. ROBINSON

Senior Counsel

ZACHARY A. AVALLONE
LIAM C. HOLLAND
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 514-3346
Fax: (202) 616-8470
Email: Andrew.e.carmichael@usdoj.gov

Counsel for Defendants

ATTACHMENT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

**U.S. NAVY SEALs 1-26;
U.S. NAVY SPECIAL WARFARE
COMBATANT CRAFT CREWMEN 1-5;
U.S. NAVY EXPLOSIVE ORDNANCE
DISPOSAL TECHNICIAN 1; and
U.S. NAVY DIVERS 1-3,**

Plaintiffs,

Case No. 4:21-CV-01236-O

v.

LLOYD J. AUSTIN, III, in his official capacity as
United States Secretary of Defense; **UNITED
STATES DEPARTMENT OF DEFENSE;
CARLOS DEL TORO**, in
his official capacity as United States
Secretary of the Navy,

Defendants.

SECOND DECLARATION OF WILLIAM K. LESCHER

I, William K. Lescher, hereby state and declare as follows:

1. I am an admiral in the United States Navy, currently serving as the Vice Chief of Naval Operations (VCNO), located in Arlington, Virginia at the Pentagon. The position of VCNO is appointed by the President, with the advice and consent of the Senate, and is the second highest uniformed Officer in the Navy. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have served in this position since May 29, 2020. I make this declaration in support of the Government's motion for a protective order.

3. I am unavailable to sit for a deposition on May 4, 2022 due to official travel to Monterey, California and San Diego, California.

4. I remain available to sit for a deposition in the Washington, DC metropolitan area on June 24, 2022. My official schedule is created two months in advance and a deposition on earlier dates would require cancellation or postponement of my official military duties and responsibilities or the cancellation of personal leave plans. I have official travel scheduled to California, Florida, and Virginia as well as Congressional hearings between now and June 24, 2022. As the VCNO, I work in coordination with the Chief of Naval Operations (CNO), the senior admiral in the U.S. Navy, in the execution of his statutory duties and responsibilities as they pertain to the employment of the Navy. Those duties include recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining the Navy, as well as assisting in the execution of any power, duty, or function of the Secretary of the Navy or the CNO. Additionally, the CNO delegated several specific responsibilities to me. I oversee programs and policies that impact Sailors and their families, including health affairs, and monitor and enact policies that promote good order and discipline in the Navy. I have offered an available time to sit for a deposition in this case, and respectfully ask the Court to account for the duties and responsibilities of the office of the Vice Chief of Naval Operations.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of May 2022.



W. K. LESCHER

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

NAVY SEALs 1-3, et al.,

Plaintiffs,

v.

LLOYD J. AUSTIN, III in his official capacity as
United States Secretary of Defense, et al.,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF AMY E. POWELL

1. I am counsel for the Government in the above-captioned matter. I submit this declaration based on personal knowledge and in support of the Defendants' Emergency Motion to Schedule Deposition for June 24, 2022, or Dates Thereafter.

2. Attached as Exhibit A is a true and correct copy of an email thread among Plaintiffs' and Defendants' counsel in this matter. This email thread reflects that Plaintiffs' counsel first approached Defendants' counsel about the deposition of the Vice Chief of Naval Operations ("VCNO") Admiral William K. Lescher by email dated April 1, 2022, that counsel for the parties exchanged several emails about the proposed deposition over the next few days, and that counsel for the parties spoke by telephone on April 6, 2022 about both the VCNO deposition and the remaining Rule 26(f) issues.

3. In the call on April 6, 2022, counsel for Defendants expressed skepticism that the deposition of Admiral Lescher was appropriate at this time, and suggested that Plaintiffs serve a proper subpoena so that we could discuss the specific request and rationale, and if necessary, brief the issue in the proper forum.

4. As reflected in Exhibit A, Plaintiffs did not comply with Defendants' suggestion or otherwise respond for almost three weeks. On April 25, 2022, Plaintiffs' counsel served a Notice of Deposition for the VCNO for May 4, 2022 in Fort Worth, TX. A true and correct copy of that

Notice is attached as Exhibit B.

5. As reflected in Exhibit A, I promptly responded the next day to state that Defendants would likely need more time.

6. On April 29, 2022, Defendants sent the letter attached as Exhibit C, offering Admiral Lescher's deposition on June 24, 2022 in Washington, DC.

7. As reflected in Exhibit A, the parties conferred by telephone on May 2, 2022. Both parties memorialized the call in emails on that thread. Plaintiffs' counsel insisted that the deposition of the VCNO must take place within 30 days and declined to withdraw or revise the existing deposition notice for May 4, 2022 in Texas. *See* Ex. A. Plaintiffs' counsel declined to offer an explanation for why they believed the deposition of the VCNO must occur within 30 days or why June 24, 2022 (or a later date) was not an acceptable date to conduct the deposition. Plaintiffs' counsel also indicated that if the VCNO failed to offer an alternative date within 30 days, or appear on Wednesday, they would seek sanctions.

8. To date, the parties have exchanged initial disclosures but have conducted no other discovery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of May, 2022, in Raleigh, NC.

/s/ Amy E. Powell

AMY E. POWELL

EXHIBIT A

From: [Powell, Amy \(CIV\)](#)
To: [Andrew Stephens](#); [Carmichael, Andrew E. \(CIV\)](#)
Cc: [Heather Hacker](#); [Mike Berry](#); [Danielle Runyan](#); [Justin Butterfield](#); [Holly Randall](#); [Snyder, Cassandra M \(CIV\)](#); [Avallone, Zachary A. \(CIV\)](#); [Yang, Catherine M \(CIV\)](#)
Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O
Date: Monday, May 02, 2022 6:26:00 PM

Thanks, Andrew, I was just working on my own recap email, and I want to confer about a couple of issues as well.

With respect to Admiral Lescher, to add to your memorialization, we also stated that we are willing to offer additional days of availability, but that they likely would be after the offered date in June, and confirmed that Admiral Lescher is not available on the noticed date. You refused to withdraw or move the noticed deposition in Texas unless additional days are provided. And refused to move it in order to give the Court time to adjudicate a motion. We stated that we would check for additional dates in May or June, but it is our current understanding that he is not available, and that the deposition notice was unreasonable in any case. We asked why it was urgent, especially in light of his status as an apex official and the language in the 26(f) report regarding phased discovery and depositions at mutually agreeable times. Admiral Lescher is travelling and extremely busy, and it is unlikely that the parties will agree on dates prior to the noticed date. Accordingly, we intend to file a motion tomorrow to stay the deposition until June 24 (probably styled as an emergency motion for a protective order). Please let us know as soon as practicable Plaintiffs' position on the motion. (If Admiral Lescher's availability opens up prior to or during briefing, we will let you know).

Second, with respect to the voluntary separations issue, we stated that anyone who qualifies for voluntary separation may do so, but we do not see a way under the current injunction to complete the involuntary separations of current class members. You expressed concern about an "SJA" document that you believed contained inaccurate information about the effect of the order. Without seeing the document, we aren't sure what our position is, but we sent you a copy of the current public NAVADMIN so that you can see the current guidance with respect to separations. Voluntary separations under Navy regulations are permitted; involuntary separations are not. If there are class members who wish to separate but who do not qualify for voluntary separation, we may be able to work with you to clarify the injunction so as to permit completion of involuntary separations. Alternatively, the Court's order permits them to withdraw their RARs, which would allow completion of the involuntary separation as well.

From your description, I am concerned that the "SJA" document you described may be attorney-client privileged. We could not tell from your description. Please send us a copy as soon as possible so that we can determine whether to request its return.

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Andrew Stephens <andrew@hackerstephens.com>
Sent: Monday, May 02, 2022 5:54 PM
To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>
Subject: [EXTERNAL] RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Amy,

To recap what we discussed on the phone, offering one day nearly two months in the future for Admiral Lescher's deposition is not reasonable. We have been seeking mutually agreeable dates for his deposition for over a month already. As he is currently under notice for 5/4, please provide us dates when he can be available in the next 30 days before then so we can send a new notice. We have no problem deposing him at the Pentagon or Navy Yard.

Best regards,

Andrew

Andrew B. Stephens
Partner

HACKERSTEPHENS LLP
www.hackerstephens.com

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From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Sent: Friday, April 29, 2022 3:48 PM

To: Andrew Stephens <andrew@hackerstephens.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Please see attached response. Happy to discuss if necessary.

Amy

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Powell, Amy (CIV)

Sent: Tuesday, April 26, 2022 11:30 AM

To: Andrew Stephens <andrew@hackerstephens.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Thank you, Andrew. We are looking into this issue, as well as the Admiral's availability and will get back to you soon. At a minimum, it is likely that we may need some more time.

Amy

From: Andrew Stephens <andrew@hackerstephens.com>

Sent: Monday, April 25, 2022 3:25 PM

To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Powell, Amy (CIV)

<Amy.Powell@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: [EXTERNAL] RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Drew,

Attached please find a deposition notice for William K. Lescher. Please let me know if you would like to discuss an alternative date and/or logistics.

Best regards,

Andrew

Andrew B. Stephens
Partner

HACKERSTEPHENS LLP
www.hackerstephens.com

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From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Sent: Thursday, April 21, 2022 2:33 PM

To: Andrew Stephens <andrew@hackerstephens.com>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Andrew,

Thank you for putting together this draft. We will review and get back to you. For initial disclosures I think we will need all of next week; putting the exchange date as April 29th. We will get back to you on our other proposed revisions shortly.

Best regards,

Drew

Drew Carmichael
Senior Trial Counsel | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Andrew Stephens <andrew@hackerstephens.com>
Sent: Wednesday, April 20, 2022 2:02 PM
To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>
Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>
Subject: [EXTERNAL] RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Drew, Amy,

Attached is a draft Joint Rule 26(f) Report with several placeholders for you all to add Defendants' position. Please let us know if you would like to discuss.

Best regards,

Andrew

Andrew B. Stephens
Partner

HACKERSTEPHENS LLP
www.hackerstephens.com

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From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Sent: Wednesday, April 6, 2022 9:16 AM
To: Andrew Stephens <andrew@hackerstephens.com>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

We can use this conference line.

1-202-600-2533

Pin 96411427#

Best regards,

Drew

From: Andrew Stephens <andrew@hackerstephens.com>

Sent: Tuesday, April 05, 2022 2:48 PM

To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: [EXTERNAL] RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Yes that works.

Andrew

From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Sent: Tuesday, April 5, 2022 1:37 PM

To: Andrew Stephens <andrew@hackerstephens.com>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Andrew,

Does 11:30 am EST work for you to discuss 26(f) issues?

Best regards,

Drew

Drew Carmichael
Senior Trial Counsel | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Andrew Stephens <andrew@hackerstephens.com>
Sent: Tuesday, April 05, 2022 5:27 AM
To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>
Subject: [EXTERNAL] RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Amy,

You relied on Admiral Lescher's declaration in the United States Supreme Court. Given your unwillingness to commit to producing him for a deposition, we will pick a date and issue a deposition notice. If you would still like to continue discussion of the 26(f) issues please let us know a time tomorrow that works for you all.

Best regards,

Andrew

Andrew B. Stephens
Partner

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From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Sent: Monday, April 4, 2022 4:21 PM

To: Andrew Stephens <andrew@hackerstephens.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Andrew:

We really don't know yet, and have not heard from Navy. Can you explain the urgency? We don't see any apparent urgency to a deposition of this nature?

From a DOJ perspective, it would be highly unusual for us to agree to deposition of an apex official before discovery has even started. The parties have not filed a discovery plan or commenced discovery. What basis do you see for any deposition now? And why an apex official (as opposed to the dozen or so other officials who have submitted declarations in connection with the PI and stay motions to date)?

Amy

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Andrew Stephens <andrew@hackerstephens.com>

Sent: Monday, April 04, 2022 1:19 PM

To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>

Subject: [EXTERNAL] RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Drew,

You chose to make Admiral Lescher a witness in this case when you submitted his declaration and relied on his written testimony in several courts, including the United States Supreme Court. Could you please answer my original question – are you willing to produce Admiral Lescher for a deposition? Please let me know your answer by 3pm CST today.

Thank you,

Andrew

Andrew B. Stephens
Partner

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From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Sent: Monday, April 4, 2022 11:44 AM
To: Andrew Stephens <andrew@hackerstephens.com>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>
Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>
Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Andrew,

Admiral Lescher is the second highest ranking military officer in the Navy and accordingly is an apex official. *See United States v. Morgan*, 313 U.S. 409, 422 (1941)). In the D.C. Circuit “there is a presumption against deposing high-ranking government officials.” *United States v. Newman*, 531 F. Supp. 3d 181, 188 (D.D.C. 2021). Under D.C. Circuit law, a party attempting to depose a high-ranking government official must demonstrate “extraordinary circumstances” requiring such a deposition. *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing *Morgan*, 313 U.S. at 422); *see also* Eastern District of Virginia Local Rule 45 (D) (“Subpoenas to Officials: Without first obtaining permission of the Court, no subpoena shall issue for the attendance at any hearing, trial, or deposition of: (1) the Governor, Lieutenant Governor, or Attorney General of any State; (2) a judge of any court; (3) the President or Vice-President of the United States; (4) any member of the President's Cabinet; (5) any Ambassador or Consul; or (6) any military officer holding the rank of Admiral or General.”). Here, we do not believe the Plaintiffs could make such a showing at this stage in the litigation as neither party has conducted any discovery (and it is unclear at this point if Plaintiffs could ever make such a showing).

Moreover, we believe the scope of discovery (if any) will be significantly impacted by an appellate ruling on the preliminary injunction. Accordingly, we propose that the parties stay discovery (including depositions) until we get an appellate ruling on the preliminary injunction (which should not be that far off as the Government has already filed its opening brief). While that appeal is pending, the Government will work to complete an administrative record for the named Plaintiffs and we can be ready to start discovery (if necessary) as soon as appellate proceedings on the preliminary injunction are complete. If we start depositions now, the landscape of the case could change and the purpose of the depositions (including the questions asked) may differ after appellate proceedings on the preliminary injunction. The Government intends to oppose any attempt to depose an official more than once and I imagine Plaintiffs would likely not want to be deposed more than once as well.

Best regards,

Drew

Drew Carmichael
Senior Trial Counsel | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Andrew Stephens <andrew@hackerstephens.com>
Sent: Friday, April 01, 2022 7:48 PM
To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>
Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>
Subject: [EXTERNAL] Re: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Drew,

I'm not aware of a reason we would need to seek leave to depose one of your declarants, but if you aren't authorized to produce him we'll need to subpoena him for a deposition in the DC area.

Yes, we should pick up the 26(f) again. Wednesday works for us.

Andrew

Andrew B. Stephens
Partner

Hacker Stephens LLP

www.hackerstephens.com

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From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Sent: Friday, April 1, 2022 3:36 PM

To: Andrew Stephens <andrew@hackerstephens.com>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly Randall <hrandall@firstliberty.org>

Subject: RE: Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Andrew,

I will ask the Navy about that. He likely resides in Northern Virginia (EDVA) which would require Plaintiffs to seek leave from that Court but I can confirm that.

Also, I think it would be helpful to pick back up our Rule 26(f) discussion. We originally put that on hold because Plaintiffs planned to file a motion for class certification and a motion for a class preliminary injunction. Now that the district court has resolved those matters we should resume those discussions.

Does Wednesday work for Plaintiffs?

Best regards,

Drew

Drew Carmichael
Senior Trial Counsel | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Andrew Stephens <andrew@hackerstephens.com>

Sent: Friday, April 01, 2022 1:43 PM

To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>

Cc: Heather Hacker <heather@hackerstephens.com>; Mike Berry <mberry@firstliberty.org>; Danielle Runyan <drunyan@firstliberty.org>; Justin Butterfield <jbutterfield@firstliberty.org>; Holly

Randall <hrrandall@firstliberty.org>

Subject: [EXTERNAL] Navy SEALs 1-26 v. Biden, 4:21-cv-01236-O

Amy, Courtney, Drew,

We plan to notice a deposition of William K. Lescher. Could you let me know when he is available to testify?

Best regards,

Andrew

Andrew B. Stephens

Partner

HACKERSTEPHENS LLP

www.hackerstephens.com

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EXHIBIT B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3; on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

NOTICE OF DEPOSITION

To: William K. Lescher
c/o Andrew Carmichael
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, will take the deposition of William K. Lescher, in his official capacity as Vice Chief of Naval Operations for the United States Department of Defense, before a Certified Court Reporter. The deposition will take place on May 4, 2022, at 9:00 a.m. at 201 Main Street, Suite 700, Fort Worth, Texas 76102.

The deposition will be stenographically and electronically recorded and will be used for

discovery and/or evidentiary purposes to the full extent allowed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Respectfully submitted this 25th day of April, 2022.

KELLY J. SHACKELFORD
Texas Bar No. 18070950
JEFFREY C. MATEER
Texas Bar No. 13185320
HIRAM S. SASSER, III
Texas Bar No. 24039157
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MICHAEL D. BERRY
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*Admitted pro hac vice.

** Not yet admitted to the D.C. Bar, but
admitted to practice law in Florida. Practicing
law in D.C. pursuant to D.C. Court of
Appeals Rule 49(c)(8) under the supervision
of an attorney admitted to the D.C. Bar.

/s/ Andrew B. Stephens
HEATHER GEBELIN HACKER
Texas Bar No. 24103325
ANDREW B. STEPHENS
Texas Bar No. 24079396
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andrew@hackerstephens.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I served the foregoing document on counsel of record for each party.

/s/Andrew B. Stephens
ANDREW B. STEPHENS

EXHIBIT C



U.S. Department of Justice
Civil Division, Federal Program Branch

Andrew E. Carmichael
Amy E. Powell
Senior Trial Counsel

Tel: (202) 514-3346
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Email: Andrew.E.Carmichael@usdoj.gov
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April 29, 2022

By Email

Andrew B. Stephens
108 Wild Basin Road South,
Suite 250
Austin, Texas 78746

Counsel for Plaintiffs

Re: The Deposition of Admiral William K. Lescher in *Navy Seals 1-26 v. Biden*, No. 21-cv-1236.

Dear Andrew,

I write in response to the notice of deposition of the Vice Chief of Naval Operations, Admiral William K. Lescher that you sent via email on April 25, 2022 seeking his deposition on May 4, 2022 in Fort Worth, Texas. Admiral Lescher is not available on May 4, 2022 and is not available to travel to Fort Worth, Texas to sit for a deposition due to the pressing nature of his military duties. However, Admiral Lescher is available to be deposed in the Washington, DC metropolitan area (where he resides) on June 24, 2022 or through a video platform such as Zoom also on June 24, 2022. We are currently looking into the availability of deposition space at the Washington Navy Yard or near the Pentagon, which will be conveniently located about a 15-minute drive from Reagan National Airport. If you are available to take the deposition on June 24, 2022 in the Washington, DC metropolitan area, we will likely be able to secure that space or a similar space for the deposition.

If you agree to holding the deposition in Washington, DC on June 24, 2022, Defendants will agree in this instance to make him available for a deposition. However, this should not be interpreted as an indication that Defendants would agree to the deposition of any other apex official, nor that Plaintiffs have made the extraordinary showing required to depose any senior government official.

Further, please be advised that Defendants will not make Admiral Lescher (or any future VCNO) available for a second deposition if you choose to go forward with his deposition on June 24, 2022.

Going forward we propose that absent special circumstances, witness depositions take place near their residence or duty station. We note that only one of the potential witnesses for either of the parties (Navy SEAL 1) resides in the State of Texas and that the vast majority of the witnesses reside in the Washington, DC metropolitan area, Virginia Beach, Virginia or San Diego, California. Our proposal will minimize the burden for both parties' witnesses. Defendants are also amenable to conducting the depositions of witnesses in the same area on back to back days to minimize any travel burdens on the attorneys.

Please let me know if you would like to meet and confer further on this issue.

Sincerely,

/s/

Amy E. Powell